Supreme Court, U.S.
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No. 96-1832

In The

Supreme Court of the United States

October Term, 1996

CYNTHIA SMITH,

Petitioner,

v.

BLUE CROSS BLUE SHIELD OF KANSAS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether this Court should grant a *petition for certiorari* if no conflict exists between the Tenth Circuit Court of Appeals and the Seventh Circuit Court of Appeals regarding reassignment as reasonable accommodation under the Americans with Disabilities Act (ADA)?

Whether this Court should review an issue that was not argued in the Tenth Circuit Court of Appeals?

RULE 29.6 LIST

Respondent, Blue Cross Blue Shield of Kansas, Inc., has no parent companies, subsidiaries or affiliates to list, pursuant to Rule 29.6.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Blue Cross Blue Shield of Kansas, Inc. respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in this case. That opinion is reported at 102 F.3d 1075 (1996).

STATEMENT OF THE CASE

Blue Cross Blue Shield of Kansas, Inc. ("Respondent") hired Cynthia Smith ("Petitioner") on June 27, 1988. Petitioner began working as a Level III Informal Review Correspondent in the Medicare division of the Government Programs department. On February 19, 1990, Petitioner transferred to the Medicare Secondary Payor division of the Government Programs department as a Level III Correspondent. On October 1, 1990, Petitioner moved to the Coordination of Benefits (COB) Inquiry unit of Respondent's Subscriber Services department. In this department, Petitioner worked as a Level III COB Inquiry Correspondent ("Inquiry Correspondent").

The primary function of the Inquiry Correspondent position is to respond to telephone calls from Respondent's customers. An Inquiry Correspondent is typically on the telephone for six and one-half hours out of an eight-hour day. Thus, this position exists solely for the purpose of answering telephone queries from customers.

Petitioner alleged that the Inquiry Correspondent position caused her stress. Petitioner attributed her stress to the fact she was required to handle telephone calls

from angry customers who had been or were being denied benefits by Respondent. Petitioner did not like having to inform people their benefits were being denied. Petitioner further alleged that she requested a demotion to a less stressful position in December 1991, which request was denied.

In October 1992, Petitioner requested to be transferred to a vacant Level II COB Clerk Expediter/Prescreener ("Prescreener") position. This position did not involve telephone contact with Respondent's customers. Respondent transferred Petitioner to the Prescreener position, even though Respondent had no duty to do so under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* Petitioner began the Prescreener position on November 7, 1992.

On November 17, 1992, Petitioner claims she was distressed when her supervisor brought her *written* Inquiry Correspondent work to do. She alleges she had an immediate panic attack. That day, Petitioner left work and never returned.

Petitioner *assumed* the Inquiry Correspondent work brought to her would entail contact with customers; she never even looked at the work that was brought to her. In fact, Inquiry Correspondent telephone work was not possible from Petitioner's desk, because her telephone was not programmed to receive incoming customer calls.

On January 11, 1993, Petitioner had been off work for fifty-five days. At that time, there was no indication she would be able to return to work. All during the time relevant to this case, Respondent maintained a leave policy. According to this policy, if an employee's leave

extended beyond forty-five days, Respondent was not obligated to return the employee to the same position. Due to Petitioner's prolonged absence, Respondent's policy, and the COB Inquiry unit staffing requirements, Respondent informed Petitioner that her position was being filled by a permanent replacement.

During Petitioner's absence from work, she received psychiatric treatment. On January 18, 1993, her doctor indicated that she would never release Petitioner to return to work for Respondent. To this date, Petitioner has never been released to return to work for Respondent.

REASONS WHY THE PETITION SHOULD BE DENIED

1. No conflict exists between the Tenth Circuit Court of Appeals and the Seventh Circuit Court of Appeals regarding reassignment as a reasonable accommodation under the ADA.

Petitioner claims the Tenth Circuit's decision in this case is in conflict with the Seventh Circuit's decision in *Gile v. United Airlines, Inc.*, 95 F.3d 492 (7th Cir. 1996). The two decisions are not in conflict. In *Gile*, the Seventh Circuit addressed *what* constitutes a reasonable accommodation under the Americans with Disabilities Act (ADA). *Gile*, 95 F.3d at 496-99. The issue in the Tenth Circuit's decision in this case was *whether* Respondent had a duty to reasonably accommodate Petitioner under the ADA.

In order to be protected by the ADA, an employee must be a "qualified individual with a disability." 42 U.S.C. § 12112(a). In this case, Petitioner was not a "qualified individual," as defined by the ADA, because she could not perform the essential function of her job as an Inquiry Correspondent, with or without reasonable accommodation. 42 U.S.C. § 12111(8).

The essential function of the Inquiry Correspondent position was to respond to Respondent's customers' inquiries by telephone. Petitioner alleges that speaking with customers distressed her. Therefore, Petitioner was not qualified to be an Inquiry Correspondent. Since Petitioner was not qualified, there was no reasonable accommodation that would enable her to do the work of an Inquiry Correspondent. Respondent had no duty to accommodate her. In spite of this, Respondent did reassign Petitioner to a Prescreener position. The Prescreener position did not require Petitioner to answer telephone calls from customers. As previously stated, the telephone at Petitioner's desk was not even programmed to receive incoming customer calls.

When Petitioner suffered a panic attack on November 17, 1992, while working as a Prescreener, it was not the result of anything the Respondent did. Respondent did not breach an accommodation provided to Petitioner. First, for reasons already stated, Respondent had no duty to accommodate Petitioner under the ADA. Therefore, it could not breach a duty not owed to her. Second, Respondent did not give Petitioner Inquiry Correspondent work that required telephone contact. The work given to Petitioner was *written* Inquiry Correspondent work.

Petitioner's termination on May 28, 1993, was also not a failure to reasonably accommodate. Petitioner had not worked since November 17, 1992, and she had been unable to perform her job with or without accommodation. Furthermore, Petitioner was not able to return to work for Respondent in *any* position. Respondent followed its normal policy regarding employees who remain unable to return to work after fifty-five consecutive days absent. As discussed above, Petitioner's doctor never has released her to return to work. Petitioner was not a qualified individual, and there was no reasonable accommodation that could have been provided for her.

The Tenth Circuit's decision in this case is not inconsistent with the Seventh Circuit's decision in *Gile*. In *Gile*, the plaintiff was a data-entry operator for United Airlines, Inc. 95 F.3d at 493. Gile worked the night shift. *Id.* at 493-94. While assigned to the night shift, Gile experienced many problems, including: daytime insomnia, fatigue, and falling asleep while driving to and from work. *Id.* at 494. Gile's problems eventually escalated into depression. *Id.* She was diagnosed as suffering from a "depressive reaction in anxiety state exacerbated with sleep disorder." *Id.* A social worker told Gile that working the night shift aggravated her symptoms. *Id.*

Gile filed a complaint against United Airlines, Inc., for failing to reasonably accommodate her by reassigning her to a different position during the day shift. *Id.* United Airlines, Inc., considered reassigning her to a day shift data-entry position, but no positions were available. *Id.* Gile was willing to be transferred to *any* position, not just a data-entry position. *Id.*

The issue decided by the Seventh Circuit was what constitutes a reasonable accommodation. (e.g., reassignment to the same position or reassignment to *any* position) The Seventh Circuit held that the ADA "may require an employer to reassign a disabled employee to a different position as reasonable accommodation where the employee can no longer perform the essential functions of their current position." *Id.* at 498. The court further recognized that there are "significant limitations on an employer's potential obligation to reassign a disabled employee." *Id.* at 499. To illustrate the limitations on an employer's obligation to reassign a disabled employee, the Seventh Circuit cited the Tenth Circuit's decision in *White v. York Int'l Corp.*, 45 F.3d 357, 362 (10th Cir. 1995). *White* held that the ADA does not require employers to do any of the following to reasonably accommodate disabled employees: promote them; reassign them to positions already occupied; or create new positions for them. 45 F.3d at 362.

In *White*, the Tenth Circuit did not conclude that the ADA does not require employers to reassign disabled employees. The court merely specified limitations on employers' obligations to reassign. *Id.* In *Gile*, the Seventh Circuit recognized further limitations on the obligation to reassign – limitations that were not addressed in *White*. 95 F.3d at 499.

Gile held that employers do not have to accommodate disabled employees by reassigning them to positions they request or prefer. *Id.* (citing *Schmidt v. Methodist Hosp., Inc.*, 89 F.3d 342, 344-45 (7th Cir. 1996)). In the current case, Respondent did in fact reassign Petitioner to a position *she requested*. According to *Gile*, this was not

required. *Id.* The Seventh Circuit further held that if an employer is obligated to reassign an employee, the reassignment should not cause an undue hardship on the employer. *Id.* (citing 42 U.S.C. § 12112(b)(5)(A)).

Regardless of whether, and to what extent, the ADA requires reassignment as reasonable accommodation, Petitioner in the current case *was* reasonably accommodated by reassignment to a less stressful position. The Seventh Circuit's decision in *Gile* supports what Respondent did in the current case.

Gile determined that in accommodating a disabled employee, employers should not only look to reassignment within the same position, but also reassignment to another position within the company. This is exactly what the Respondent did by transferring Petitioner to the Prescreener position. Once Petitioner became totally disabled, there was nothing more the Respondent could do to accommodate her.

The difference between the Seventh Circuit's decision in *Gile* and the Tenth Circuit's decision in the current case is that the Seventh Circuit addressed *what* constitutes a reasonable accommodation, while the Tenth Circuit addressed *whether* Respondent had a duty to accommodate Petitioner. In *Gile*, the plaintiff was able to perform the essential function of her job. Gile experienced adverse effects resulting from the shift she worked, not the job itself. Petitioner in this case could not perform the essential function of the Inquiry Correspondent job. Furthermore, after November 17, 1992, Petitioner was completely disabled and could not perform the essential function of *any* job offered by Respondent.

The Tenth Circuit and the Seventh Circuit are not in conflict regarding an employer's duty to reassign disabled employees as reasonable accommodation. The two cases Petitioner cites to support this claim did not address the same issue. In *Gile*, the Seventh Circuit cited the Tenth Circuit's decision in *White*. This same *White* opinion was relied upon by the federal district court and the Tenth Circuit panel in the case at bar. If the two circuits were in conflict, one would not be citing the other to support its position. Therefore, this Court should not grant certiorari based on a conflict between the Tenth and Seventh Circuits. No conflict exists.

2. Even if Respondent had a duty to reasonably accommodate Petitioner, it did so.

Since Petitioner was unable to perform the essential functions of the Inquiry Correspondent job, she was not a "qualified individual with a disability." Therefore, Respondent had no duty to reasonably accommodate Petitioner under the ADA.

In spite of this, Respondent did accommodate Petitioner by reassigning her to a job that did not require telephone contact with Respondent's customers. Once Petitioner was reassigned to the Prescreener position, she never handled incoming customer calls. Handling incoming calls was physically impossible because Petitioner's telephone was not equipped to receive incoming calls from customers.

Petitioner suffered a panic attack when she *assumed* written Inquiry Correspondent work that was assigned to her would involve customer contact. The *written* Inquiry

Correspondent work involved no telephone contact with customers, and, therefore, Respondent did not breach Petitioner's accommodation.

3. Petitioner cannot bring an issue before this Court that was not raised before the Tenth Circuit Court of Appeals.

In the Tenth Circuit Court of Appeals, Petitioner argued that Respondent failed to reasonably accommodate her. In her petition for writ of certiorari, Petitioner now argues Respondent did not provide a reasonable accommodation, because it offered her a job in which she was unable to perform an essential function.

When issues are neither raised nor considered in the circuit courts, this Court ordinarily does not consider them. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (holding that a question presented in the petition for certiorari but not raised in the court of appeals is not properly before the Court).

The Court will consider questions raised for the first time only in exceptional circumstances. *See, e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976). The case currently before the Supreme Court does not involve exceptional circumstances. Instead, Petitioner is restructuring her argument in a last-ditch effort to save her case.

Since Petitioner failed to raise this issue in the courts below, the record is inadequate to permit the Court to consider this argument. The district court's decision

granting summary judgment and the Tenth Circuit's decision affirming the district court were proper, because no genuine issue of material fact exists. Fed. R. Civ. P. 56(c).

CONCLUSION

For the reasons discussed above, Respondent respectfully requests that Petitioner's petition for a writ of certiorari be denied.

Respectfully submitted,

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